No. 84-59

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IN THE

Supreme Court of the United States

October Term, 1984

THE CLEVELAND-CLIFFS STEAMSHIP COMPANY, et al., *Petitioners,*

vs.

HONORABLE ALVIN I. KRENZLER, United States District Judge for the Northern District of Ohio, Eastern Division, *Respondent,*

and

RESERVE MINING COMPANY,
Respondent and Defendant Below

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT RESERVE MINING COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS R. THIBODEAU, Counsel of Record
JOSEPH J. ROBY, JR.
JOHNSON, FREDIN, KILLEN, THIBODEAU & SEILER, P.A.
811 Norwest Center
Duluth, Minnesota 55802
(218) 722-6331
Counsel for Respondent and Defendant Below

Of Counsel for Respondent and Defendant Below:
ROBERT G. McCREARY, JR.
ARTER & HADDEN
1100 Huntington Building
Cleveland, Ohio 44115
(216) 695-1100

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QUESTION PRESENTED

Whether petitioners have shown special and important reasons justifying review on writ of certiorari as required by Sup.Ct.R. 17.1, 21.1(j).

RULE 28.1 STATEMENT

At the time of the stranding, November 29, 1979, respondent Reserve Mining Company, a Minnesota corporation, was owned by:

Armco, Inc. - 50% of the stock

Republic Steel Corporation - 50% of the stock

Presently, Reserve Mining Company is a Minnesota partnership. The partners are:

Republic Reserve, Inc. (a wholly owned subsidiary of Republic Steel Corporation)

First Taconite Corporation (a wholly owned subsidiary of Armco, Inc.)

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STATEMENT OF THE CASE

Petitioners' Statement of the Case is generally correct as to the procedural posture of this matter. Petitioners neglect to identify defendant below, Reserve Mining Company, (hereinafter called "Reserve"), the present respondent. At

the time of the stranding, Reserve was a Minnesota corporation with its principal place of business on the north shore of Lake Superior at Silver Bay, Minnesota. There Reserve owns and operates a taconite ore pelletizing facility.

Petitioners' Statement of the Case is seriously mistaken on two points. First, petitioners assert that the original transfer motion was made because Reserve is incorporated in Minnesota and its principal place of business, the place where the stranding occurred, an unspecified number of its witnesses, and the wreck of the vessel were located there. Reserve's transfer of venue motion contained much more substance.

Reserve's motion pleadings provided the District Court with the following reasons to exercise its broad discretion to transfer venue:

a) Reserve is a Minnesota corporation;

b) Reserve's principal place of business is at Silver Bay, Minnesota;

c) The docking facility for which the vessel was headed is located at Silver Bay, Minnesota;

d) One of the petitioners, The Cleveland-Cliffs Iron Company, does business in Minnesota;

e) The stranding occurred on the Minnesota shore of Lake Superior near Reserve's harbor;

f) The wreck is located at the Fraser Shipyards, Superior, Wisconsin, about two miles from the U.S. District Courthouse in Duluth, Minnesota;

g) Many of Reserve's important witnesses are located in Minnesota, either in the Silver Bay or Duluth

areas (these specific names were submitted to the District Court):

—George F. Keller, supervisor of Reserve's Casualty Property Department; familiar with the stranding and salvage of the vessel;

—Bruce Jordan; eye witness to the attempted docking of the vessel;

—Raymond Jackson; another eye witness to the attempted docking;

—Sidney Gernander; marine surveyor who surveyed the wreck;

—Fraser shipyard employees;

—Various other Reserve employees.

h) The vessel's captain resides in New Hampshire; the vessel's chief mate resides in Pennsylvania; both will be required to travel whether the case is venued in Ohio or Minnesota;

i) The real parties-plaintiff in interest are the various insurers, not the two Ohio-based Cleveland-Cliffs companies; except for only one, the other eight insurers are located throughout the country and overseas; to them, Ohio venue and Minnesota venue are indistinguishable.

(After the District Court issued its order but before denial of a writ of mandamus by the Court of Appeals, Reserve retained the services of three more experts, all of whom live in the Duluth, Minnesota area.)

Petitioners' Statement of the Case, for its second significant error, misstates the District Court's rationale for trans-

ferring venue. At page 4 of their brief petitioners allege that the "District Court nevertheless granted Reserve's motion for a transfer of venue to Duluth, Minnesota, *only* because the wreck of the vessel was located there *and for no other reason*. . ." [emphasis added] This is a false characterization of the transfer order.

The order is reproduced in petitioners' appendix B. The Honorable Alvin I. Krenzler cited the governing statute and cited several relevant cases. Most importantly, the District Court expressly mentioned the following criteria as those which it should consider:

a) The convenience of parties and witnesses;

b) The interests of justice;

c) Prevention of wasted time, energy, and money;

d) Protection of litigants against unnecessary inconvenience and expense;

e) The private interests of the litigants;

f) Relative ease of access to sources of proof;

g) Availability of compulsory process for the attendance of unwilling witnesses;

h) The possibility of viewing the premises;

i) The relative advantages and obstacles to a fair trial;

j) All other practical problems that make the trial of a case easy, expeditious, and inexpensive;

k) Enforceability of any judgment obtained.

It is true that the District Court at one point referred to the wreck's location. However, the District Court obviously did not mean to imply that it ignored the other ten criteria it had mentioned. Petitioners do fail to mention the other criteria by citing only the last paragraph of the District Court's order. Nor can petitioners convincingly assert that the Sixth Circuit Court of Appeals adopted "a rule that the forum should be determined in admiralty cases *in personam* by the location of the vessel. . ." Petitioners' Brief p. 5. That issue was not before the Court of Appeals. Instead, only the District Court's alleged abuse of discretion was at issue. The Court of Appeals held only that the discretion had not been abused. Petitioners' Appendix A.

REASONS FOR DENYING THE WRIT

This proceeding is governed by Sup.Ct.R. 17.1 which states:

> A review on writ of certiorari is *not a matter of right*, but of judicial discretion, and will be granted only when there are *special and important reasons therefor*. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. [emphasis added]

Sup.Ct.R. 21.1(j) requires petitioners' petition to contain "a direct and concise argument amplifying the reasons relied on for the allowance of the writ. See rule 17." The question presented, therefore, is whether petitioners have shown special and important reasons justifying review on writ of certiorari. The answer clearly is no.

In *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955), the Court explained the "special and important reasons" criterion:

> "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. . .
>
> . . . .
>
> ". . . [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." [quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923)]

At no time do petitioners even mention, much less argue, the "special and important reasons" rule. Petitioners

never contend that there is a conflict among the Circuit Courts. Petitioners make no argument that the Sixth Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision. Nor is there any claim that the Circuit Court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioners have absolutely ignored the requirements of Sup.Ct.R. 17.1 and have absolutely failed to show any special and important reasons justifying a writ of certiorari. All petitioners have done is express their unhappiness with having to try the case in Minnesota. This unhappiness hardly rises to the level of "cases involving principles the settlement of which is of importance to the public." *Rice v. Sioux City Memorial Park Cemetery, Inc., supra.*

In *Norwood v. Kirkpatrick,* 349 U.S. 29 (1955), this Court characterized a District Court's venue transfer power as "broad." The same opinion points out that the venue transfer statute intends to permit District Courts to grant transfers upon a lesser showing than that required under the doctrine of *forum non conveniens.* The discretion to be exercised under the statute is "broader" than the discretion exercised under the older doctrine. Therefore, the Court of Appeals correctly held that the District Court did not abuse its broad discretion. Now the Supreme Court must decide if the Court of Appeals' action is of such significant national importance so as to justify yet another review even though petitioners have already had two District Court pro-

ceedings and a Court of Appeals' proceeding on the venue issue. The Supreme Court should decline to grant what would be the fourth hearing on a matter which concerns only petitioners and is of little importance to the public.

Reserve respectfully states that the merits of the venue transfer are not for this Court to decide just as they were not for the Court of Appeals to decide. This Court must decide only whether Sup.Ct.R. 17.1 has been satisfied, and the Court of Appeals decided only that the District Court had not abused its broad discretion. In this writ proceeding it is irrelevant whether this Court or some other court would have denied the transfer motion. Nor is it relevant whether this Court or some other court believes the District Court made a mistake. Nor should there be a balancing of factual connections with Ohio against factual connections with Minnesota.

Even though the merits of the District Court's transfer decision are not before the Supreme Court, it is interesting to note that there is precedent for the action of the District Court. In *U.S. Coast Guard Vessel CG-95321*, 221 F. Supp. 163 (D.N.H. 1963), a limitation of liability proceeding, the claimant moved the District Court to transfer the proceeding to the District Court for Massachusetts. The case arose out of the grounding and sinking of a vessel in the tow of the subject Coast Guard vessel. Utilizing former Admiralty Rule 54, the New Hampshire District Court granted the transfer motion. The opinion states:

> I do not think that the convenience of the parties would be served by retaining this proceeding here. The home port of the Coast Guard Vessel CG-95321 is New Castle, New Hampshire, and presumably some of their records are there and the crew is stationed

> there. But New Castle is no more convenient to Concord than it is to Boston. Additionally, it appears that certain records are maintained at the First District Coast Guard Headquarters in Boston and that while the vessel was assigned to duty along the entire New England Coast, most of its service was in and around Massachusetts. In fact, it left from Woods Hole, Massachusetts, on the morning of December 18, 1961, to render assistance to the Barbara and Gail. It also appears that the CG-95321 spends time in ports in Massachusetts and presumably any equipment inspection, repairs or general maintenance just prior to leaving Woods Hole was accomplished in Massachusetts. All the claimants are residents of the New Bedford, Massachusetts area; *the accident occurred in waters off Massachusetts;* all the records of the Sandra & Dennis Fishing Corporation are in Massachusetts, as well, presumably, as many of the above-mentioned Coast Guard records, and *the Coast Guard investigation took place in Boston.* [emphasis added]

Similarly here, investigations by both the National Transportation Safety Board and the United States Coast Guard were conducted in Duluth.

In *Sioux City and Barge Line, Inc. v. Upper Mississippi Towing Corp.*, 221 F.Supp. 727 (S.D.Tex. 1963), the libelant originally filed an action *in personam* for damages arising out of a collision occurring on the Mississippi River near Baton Rouge, Louisiana. Respondent moved the Court for an order transferring the case under 28 U.S.C. §1404 (a) to the Eastern District of Louisiana. The Texas District Court stated:

> . . . [T]here are sufficient factors to command a transfer. *The collision which is the basis for this suit occurred in Louisiana. It was investigated in Louisiana,*

> therefore, the various surveyors who examined the vessel are located there. Although all of the crew members of the respective vessels involved in the collision are not permanently stationed within the Eastern District of Louisiana, at least one does reside there; whereas, none reside in the Southern District of Texas. One of the vessels does operate regularly in the Eastern District of Louisiana but is infrequently, if ever, present in the Southern District of Texas. It therefore appears that the Eastern District of Louisiana would be a more convenient forum for the witnesses and the parties than would the Southern District of Texas. However, the determinative factor in ordering the transfer of this cause to the Eastern District of Louisiana is that the interests of justice demand it. The only known witnesses to the collision who were not members of the crew of one of the vessels involved are persons who were at the time of the collision members of the crew of a third vessel, the Tug John E. Coon. *These witnesses were not and apparently are not in the employ of any of the parties to this action.* It appears they now reside in the Baton Rouge, Louisiana area and, consequently, are outside the subpoena power of this Court. They would be within the subpoena power of the District Court for the Eastern District of Louisiana. It would appear that these witnesses would be independent and unbiased and, therefore, probably present the most credible testimony as to the cause of the collision. Accordingly, I find that it would be in the interest of justice to have them subject to the subpoena power of the trial court and therefore available in person to testify, if desired by any parties thereto. [emphasis added]

The italicized clauses contain facts similar to those in the present case. The stranding of the vessel occurred on the

shores of Lake Superior in the District of Minnesota. The stranding was investigated in the District of Minnesota. Two independent witnesses not employed by the parties to this action, Mr. Bruce Jordan and Mr. Raymond Jackson, both reside in Silver Bay, Minnesota and are not within the subpoena power of the District Court for the Northern District of Ohio.

The factors cited in these two cases; the convenience to Reserve's many witnesses and the minor inconvenience to petitioners' witnesses; the location of the wreck; and the other factors cited and relied upon by the District Court; all show that the District Court for the Northern District of Ohio clearly did not err in exercising its broad discretion.

At page 13 of their brief, petitioners acknowledge the applicability of the clearly erroneous standard to the Court of Appeals' review. That appellate court correctly held that the District Court did not clearly err in transferring venue. However, Sup.Ct.R. 17.1, not the clearly erroneous standard, governs the present proceeding. As mentioned above, petitioners failed both to cite and address this rule.

Finally, the Supreme Court should be aware that while the venue issue worked its way through the Ohio District Court and the Court of Appeals for the Sixth Circuit, discovery in the underlying action proceeded under the direction of the United States Magistrate for the District of Minnesota, Fifth Division. At the close of discovery, and pursuant to a pre-trial order of the Minnesota Magistrate, the parties filed with the Minnesota District Court detailed exhibit lists, detailed witness lists, a lengthy stipulation of uncontroverted facts, and lengthy trial briefs. Then, on January 6, 1984, the Minnesota Magistrate certified to the Minnesota District Court that the case was ready for

trial. Since that time the parties have been awaiting a trial date from the Minnesota District Court. The Minnesota District Court is very familiar with this file since discovery proceeded under its auspices and since the case has been ready for trial for many months. All of the work done by the Magistrate in Minnesota and any work that may have already been done by the Minnesota District Court judge in reviewing this file in preparation for trial will be duplicated or wasted if the case is transferred back to the Ohio District Court. The efficient administration of justice would be ill-served.

CONCLUSION

Petitioners have failed to show special and important reasons justifying review on writ of certiorari. The petition for a writ of certiorari to the Sixth Circuit Court of Appeals should be denied.

Respectfully submitted,

THOMAS R. THIBODEAU, Counsel of Record
JOSEPH J. ROBY, JR.
JOHNSON, FREDIN, KILLEN, THIBODEAU & SEILER, P.A.
811 Norwest Center
Duluth, Minnesota 55802
(218) 722-6331
Counsel for Respondent and Defendant Below

Of Counsel for Respondent and Defendant Below:
ROBERT G. McCREARY, JR.
ARTER & HADDEN
1100 Huntington Building
Cleveland, Ohio 44115
(216) 695-1100